90-1547

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

- -

EMILIANO RUSCITTI and
LINDA RUSCITTI GOULD,

Petitioners

v.

CARL NUCKOLS,

Respondent

- -

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

- -

PETITION FOR WRIT OF CERTIORARI

- -

JOHN A. KINTZELE
1317 Delaware Street
Denver, Colorado 80204
(303) 892-6494
COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether the petitioners have been denied due process by the Courts' not ordering and then holding of a hearing on the Second Motion to Set Aside Default Judgment, which is in part, based upon the intentional and material misstatements of plaintiff's counsel to the Trial Court, at the time of obtaining the Default Judgment.

2. Whether the United States Supreme Court has a Duty of Supervision over the conduct of counsel, in respect to Default Judgment.

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO RULE 14

Carl Nuckols, Plaintiff-Appellee

Linda Ruscitti Gould, Defendant-Appellant

Emiliano Ruscitti, Defendant-Appellant

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PETITION FOR WRIT OF CERTIORARI
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Petitioners, Emiliano Ruscitti and LInda Ruscitti Gould pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado.

REPORT OF THE OPINIONS BELOW

The opinion (unpublished) of the Colorado Court of Appeals is reproduced as Appendix "E" to this Petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction, pursuant to the Constitution of the United States, 28 USC §1254 or in the alternative 28 USC §1257 and Rules of Court of the Supreme Court, Rule 10(c).

APPLICABLE CONSTITUTIONAL PROVISIONS

The Constitutional Amendments involved are the due process clause portion of the 14th amendment to the United States Constitution; and Article II, section 25 of the Constitution of Colorado.

APPLICABLE STATUTORY PROVISIONS

C.R.S. 12-5-101.

STATEMENT OF THE CASE

Petitioner, Emiliano Ruscitti was born in Italy. His English language skills are limited, even though he is fluent in his native language.

Linda Ruscitti Gould is the daughter

of Emiliano, born in the United States, but raised in an Italian-American household.

At the time of the automobile accident described below, Linda Ruscitti Gould was unmarried and she lived at home with her parents.

On May 4, 1985, respondent Carl Nuckols collided with the Ruscitti family automobile, which was being driven by petitioner, Linda Ruscitti. Both drivers received citiations as a result of the accident. It is doubtful that respondent would have prevailed if the case had actually gone to trial.

Plaintiff, Ms. Ruscitti, reported the accident to the insurance company. Respondent negotiated directly with the petitioners' insurance company; the petitioners were not personally involved in the negotiations and were indeed ignorant of the negotiations.

On May 14, 1987, a summons and complaint were filed by respondent in the District Court,

in Weld County, in the State of Colorado.

The affidavit of service filed with the court states that the "defendants (petitioners) were served with the summons and complaint on May 6, 1987".

The petitioners each deny they were ever served.

On July 29, 1987, a Motion for Entry of Default and Default Judgment was filed.

On September 25, 1987 there was a hearing on the Motion for Default Judgment, even though the Ruscittis had automobile liability insurance, and on September 30, 1987 a written judgment was entered against the petitioner in an amount of $35,156.00, plus two-and-one-half years of interest.

At the trial court, during the default judgment hearing on September 25, 1987, the Judge asked Gilbert Sackheim, respondent's attorney the following:

"How come they (referring to

petitioners) are not here? (V3, P.14, L24, T of 9/25/87.

The attorney, Sackheim, incorrectly answered:

"Well, I have dealt with them; they (V3, P.14, L.25, T. of 9/25/87) have been uncooperative, and I intend to continue to deal with them." (V.3, P.15, Ls. 1 and 2, T of 9/25/87).

These representations were absolutely false as the deposition excerpts of attorney Sackheim confirm.

Actually, the petitioners knew nothing of and had had absolutely no dealings with respondent's attorney on or before September 25, 1987. Thereafter, Mr. Sackheim waited almost six months before he presented the judgment for a $35,156.00 to petitioner's insurance carrier in March, 1988. The insurance carrier eventually rejected coverage for

the petitioners, since petitioners failed to comply with a condition of their policy, namely, to notify the carrier of any suit against them. Thereafter the carrier would not pay for the judgment debt against petitioners, or give them any assistance.

Petitioners obtained non-insurance counsel and on June 17, 1988, filed a Motion to Set Aside Default Judgment.

At the hearing on September 8, 1988, petitioners' attorney did not bring out Mr. Sackheim's undeniable misrepresentation. This was a gross error because credibility was the issue. That attorney tried to have the default judgment set aside based on the inaccurate argument that the Statute of Limitations barred the underlying personal injury damages lawsuit and he made the argument that there had been no service of process on either

defendant.

On September 8, 1988 the trial court, from the bench, denied the Motion to Set Aside the Default Judgment, saying he disbelieved the Ruscittis.

New evidence was discovered by this counsel, that went to the heart of the credibility of Carl Nuckols and his lawyer, Mr. Sackheim. Mr. Sackheim had made false statements that perhaps, influenced the Judge to continue the default judgment against petitioners.

This counsel filed a Second Motion to Set Aside Default Judgment on April 14, 1989, with the District Court in Weld County, supported by Affidavits, based on the new evidence.

The petitioners' Second Motion to Set Aside Default Judgment was denied on July 31, 1989, without a hearing, despite the Trial Court's being advised of Mr. Sackheim's false

statements.

Petitioners have posted a $50,000.00 bond in this matter. The bond has grown to be in excess of $50,000.00. Release of the bond has been stayed, pending the outcome of this petition to the United States Supreme Court.

Specifically, the Second Motion to Set Aside the Default Judgment was based on attorney Sackheim's misrepresentation to the trial court. However, the trial court refused petitioners a hearing as to the effect, if any, attorney Sackheim's statement had on the trial court at the time it entered the default judgment against them. (See Appendix A, ORDER, District Court, Weld County, Colorado, dated July 3, 1989).

Thereafter, the petitioners raised this question, among others, to the Colorado Court of Appeals and to the Supreme Court of Colorado regarding whether the trial court should grant a rehearing because of attorney

Sackheim's misrepresentation during the default hearing. (See, Appendix E ORDER, the Court of Appeals of the State of Colorado, dated June 14, 1990; and Appendix F Order of Court, Supreme Court, State of Colorado, dated December 10, 1990).

REASONS FOR GRANTING THE WRIT

A. DUE PROCESS

Petitioners urge that failure to grant the Ruscittis a hearing, even though respondent's attorney misrepresented facts surrounding the circumstances at the default judgment hearings, is violative of their right to due process.

Due process, respectfully, requires a hearing. La Plata River and Cherry Creek Ditch Co. v Hinderlinder, 25 P.2d 186, 93 Colo. 128, appeal dismissed 291 U.S. 650, 78 L.Ed. 1044, 54 S.Ct.557 (1933).

Due process is flexible, but demands such procedural protection as the particular

situation necessitates. People v Taylor, 618 P.2d 1127 (Colo. 1980).

The due process requires fundamental fairness. Air Pollution Variance Bd. v Western Alfalfa Corp., 191 Colo. 455, 553 P.2d 811 (1976).

"Due Process of Law" within this clause is not equivalent to process of any particular state and has reference rather to a standard of process that may cover varieties of process that are expressive of different combinations of historical or modern, local or other jurisdictional standards, provided they do not conflict with fundamental principals of liberty and justice. Bute v People of State of Illinois, 68 S.Ct. 763, 333 U.S. 640, 92 L.Ed. 986 (Ill. 1948).

By "Due Process of Law" is meant that which, following the forums of law, is appropriate to the case, and just to the parties affected; it must be pursued in the

ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the relief sought. Hagan v Reclamation Dist. No. 108, 4 S. Ct. 663, 111 U.S. 701, 28 L.Ed 569 (Cal.1884).

The requirements of due process have been met when the individual concerned is under the Court's jurisdiction and has been given an opportunity to be heard. MacFadzean v Lohr, 152 Colo. 31, 380 P.2d 20 (1963).

B. IT IS WITHIN THE POWER OF THIS SUPREME OF THE UNITED STATES TO REGULATE ATTORNEY SACKHEIM'S CONDUCT

An attorney has a high duty as an officer of the Court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v Kenelly, 648 P.2d 1065 (Colo. 1982). People v Haase, 781 P.2d 80 (Colo. 1989).

The Colorado Court, respectfully, failed to take into consideration the effect of Mr. Sackheim's misrepresentation to it, when it denied petitioners' Second Motion to Set Aside a Default Judgment, without a hearing.

The Code of Professional Responsibility, DR1-102 guards against such misconduct by providing that:

> (A) A lawyer shall not:
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.

Once admitted to the bar, lawyers are subject to continuing scrutiny for the organized bar and the Court. In re Griffiths, 413 U.S. 717, 37 L.Ed. 2d 910, 93 S.Ct. 2851 (1973).

Any violation by an attorney of strictures against false, fraudulent, or perjured testimony or evidence would constitute serious breach of an attorney's duty to the Court and should be treated accordingly. Geders v U.S., 47 L.Ed. 2d 592, 425 U.S. 80, 96 S.Ct. 1330, (1976).

It is within the authority of the Colorado Supreme Court to promulgate rules governing the admission and regulation of lawyers. C.R.S. 12-5-101; and Unauthorized Practice of Law Committee of Supreme Court of Colorado v Bodhaine, 738 P.2d 376 (Colo. 1987).

Additionally, the Supreme Court has exclusive power to admit applicants to the bar of the state, to prescribe rules to be followed in discipline of lawyers and to revoke a license to practice law, or otherwise assess penalties in disciplinary proceedings where the conduct of a lawyer accused amounts

to a violation of law, or involved moral turpitute or dishonorable conduct. Petition of Colorado Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Even though the issues are and will only be civil in nature, it is within the Court's power to sanction the respondent. The Supreme Court of Colorado upheld the decision of the Court below, thereby failing to take into consideration Mr. Sackheim's misrepresentation and the effect it had on the Court below and the administration of justice.

THE SUPREME COURT OF THE UNITED STATES HAS SUPERVISORY AUTHORITY OVER STATE SUPREME COURTS

The United States Supreme Court's supervisory authority over lower Federal Courts allows the Supreme Court to intervene to protect the integrity of the Federal system, while its authority over state court's bars is limited to enforcing Federal constitutional requirements. Frazier v Heebe,

107 S.Ct. 2607, 482 U.S. 641, 96 L.Ed 2d 557 (1987); and Barnard v Thorstenn, 489 U.S., 103 L.Ed. 2d 559, 109 S.Ct. 1294 (1989).

The Supreme Court has authority to scrutinize the decision of the Colorado State Supreme Court, since that Honorable Court did not protect petitioners' fundamental Constitutional right to Due Process.

Additionally, since the Colorado State Supreme Court has exclusive power to regulate attorneys in the state, petitioners are powerless since that Honorable Court has determined not to address the misrepresentation before the Trial Court in this case.

TRIAL AFTER NOTICE AND OPPORTUNITY TO BE HEARD

Respectfully, Mr. Nuckols and Mr. Sackheim may lose a trial on the merits. However, the Ruscittis have insurance, if the judgment is set aside. All the Ruscittis seek here is a second hearing on the default judgment to allow the Colorado Courts to

determine the appropriate effect of Mr. Sackheim's misstatements to the Trial Court.

CONCLUSION

Respectfully, the Ruscittis just want a hearing in which credibility is properly determined.

Respectfully, the Trial Court should measure Carl Nuckols' credibility by any and all misstatements made on Carl Nuckols' behalf.

Respectfully submitted,

Jack Kintzele, #1842
Attorney for Petitioners
1317 Delaware Street
Denver, Colorado 80204
(303) 892-6494

CERTIFICATE OF MAILING

I, John A. Kintzele, hereby certify that on the _____ day of April, 1991, I deposited a true and correct copy of the foregoing in the United States mail, postage prepaid to the following:

DAY & SACKHEIM
Attn: Gilbert M. Sackheim, Esq.
1910 Seventh Street
Boulder, Colorado 80302

Honorable Robert A. Behrman
District Court Judge
9th Ave & 9th Street
Greeley, CO 80632

_____

account the medical expenses in excess of $5300, taking into account the loss of wages in excess of $5700, and taking into account the general effect that it has had on Mr. Knuckols' (sic) life, we would ask the Court to enter a judgment in his favor and against the defendants in the amount of at least $35,000.

THE COURT: All right, it will be the order of the Court that judgment will enter in favor of the plaintiff and against the defendants jointly and severally in the amount of $35,000.

MR. SACKHEIM: Would the Court like me to prepare an order?

THE COURT: Yes, or we can use our regular form, whatever you prefer.

MR. SACKHEIM: Perhaps I could go ahead and prepare an order.

THE COURT: All right, that would be

fine. Bring it over and I'll be glad to sign it.

MR. SACKHEIM: I assume that there would be interest on the judgment from the date of the accident?

THE COURT: Yes, that's right as provided by law, and you will have judgment for costs.

THE COURT: Do they have any insurance?

MR. SACKHEIM: Yes.

THE COURT: How come they are not here?

MR. SACKHEIM: Well, I have dealt with them; they have been uncooperative, and I intend to continue to deal with them.

THE COURT: But they have insurance?

MR. SACKHEIM: Yes.

THE COURT: Well, you are fortunate. Well, thank you very much. I hope you get along. A broken hip is hard, but at least you are young.

(Whereupon, proceedings were adjourned.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcript of my stenotype notes taken in my capacity as official reporter of Division 1, 19th Judicial District, State of Colorado.

Dated at Greeley, Colorado, this 19th day of December, 1988.

ELIZABETH A. MELDAHL, C.S.R.

APPENDIX B

DISTRICT COURT, COUNTY OF WELD,
STATE OF COLORADO
Civil Action No. 87 CV 0493, Division 1

ORDER

CARL NUCKOLS,

Plaintiff

v

LINDA E. RUSCITTI, now known as LINDA E. GOULD AND EMILIANO RUSCITTI,

Defendants.

This case is pending on six motions, to-wit;

(1) Second Motion to Set Aside Default Judgment filed by defendants on April 14, 1989.

(2) Motion to Dismiss Defendants' Second Motion to Set Aside Default Judgment; Motion for Attorney's Fees filed by plaintiff April 7, 1989.

(3) Motion for Protective Order; Motion

for Attorney's Fees filed by plaintiff April 19, 1989.

(4) Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989.

(5) Motion for Cost Bond filed by defendants May 18, 1989.

(6) Motion to Strike Affidavit of Mark Gould, Affidavit of Lora Ruscitti, and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele filed by plaintiff June 27, 1989.

This case was appealed from this court to the Colorado Court of Appeals. On April 6, 1989, the appeal was dismissed for failure of the defendants-appellants to respond to an order to show cause issued by the Court of Appeals. On May 17, 1989, the Court of Appeals issued its mandate to this court which states as follows:

> This cause came on to be heard on the record on appeal from the District Court of the County of Weld, State of Colorado, and in consideration whereof, it is ORDERED that the appeal is DISMISSED.

The record on appeal was returned to this court on July 11, 1989, enabling this court to consider certain aspects of the defendants' motions which required reference to the record.

The Second Motion to Set Aside Default Judgment filed by defendants is based primarily on matters relating to the service of process in this action. Defendants contend that the service was made on a fifteen year old child, Lora Ruscitti, rather than on defendant Linda Ruscitti, now Linda Gould. The court conducted a full evidentiary hearing on the point and determined the factual issues contrary to the contentions of the defendants.

The defendants have filed a series of

affidavits which do not convince the court that further hearing is justified. Lora Ruscitti now says that she testified falsely at the original evidentiary hearing. Doubts concerning the credibility of Lora Ruscitti as a witness substantially contributed to the court's findings at the evidentiary hearing. The affidavit strengthens, rather than reduces, those doubts. Linda Gould's husband now says that he remembers that she was with him in Longmont on the evening of service. Linda Gould testified that she could not remember where she was that evening and no explanation is made why the husband was not produced at the evidentiary hearing.

The motion also indicates that the summons was defective; however, the court's examination does not reveal any defect. The rest of the allegations of the motion do not appear to have merit.

Since the factual matters were the

subject of a full hearing and were decided adversely to defendants and since the other matters raised do not appear to have substantial merit, the Second Motion to Set Aside Default Judgment should be denied.

The foregoing action substantially grants the Motion to Dismiss Defendants' Second Motion to Set Aside Default Judgment; Motion for Attorney's Fees. The court will not, however, order attorney fees in this connection.

The action of the court regarding the Second Motion to Set Aside Default Judgment requires the granting of Motion for Protective Order; Motion for Attorney's Fees. There appear to be no factual matters pending in this action and there can be no purpose to plaintiff's deposition. Here again the court will not impose attorney fees.

The Motion for Cost Bond filed by the Defendants is moot. It is not established

that plaintiff is, in fact, a nonresident, and final judgment has been entered herein. Under these circumstances a cost bond is not at present required.

The Motion to Strike Affidavit of Mark Gould, Affidavit of Lora Ruscitti, and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele should be denied. The court has considered those affidavits, but did not find them to be convincing.

The court is unclear what action the defendants intend to take regarding their appeal. It may be that they have abandoned it, or it may be that they will attempt to reinstate their appeal. The court will take no present action on the Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989, and will order that a hearing be set on that motion. Setting should be made with the clerk of this division, Mrs. Shirley

Stow, (303) 356-4000, extension 4554. Settings are made on Tuesdays, Wednesdays, and Thursdays between 8:30 A.M. and 9:00 A.M.

The Court of Appeals apparently entertained some question as to whether the judgment entered herein and signed by the court on September 30, 1987, is a final judgment. The court does not fully understand the reasons for such doubts; however, to avoid any possible misunderstanding, the court will enter a blanket order denying all other post-judgment motions herein except the Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff upon which a hearing must be held. It is the court's understanding that the pendency of that motion will not affect the finality of the judgment herein.

Although the court has serious doubts as to the underlying validity of a number of the motions which have been filed, it has not

awarded attorney fees because of the somewhat confusing circumstances surrounding the appeal of this case. Since this order should clarify the situation, a somewhat different standard may be applied to future motions for attorney fees.

ORDER

For the reasons set forth above, it is ORDERED by the court as follows:

1. Second Motion to Set Aside Default Judgment filed by defendants on April 14, 1989, is denied.

2. Motion to Dismiss Defendants' Second Motion to Set Aside Default Judgment; Motion for Attorney's Fees filed by plaintiff April 17, 1989, is granted to the extent that defendants' motion is denied, and is denied as to attorney fees.

3. Motion for Protective Order; Motion for Attorney's Fees filed by plaintiff April 19, 1989, is granted, except for the request

for attorney fees which is denied.

4. Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989, shall be set for hearing before the court in accordance with the instructions set forth above.

5. Motion for Cost Bond filed by defendants May 18, 1989, is denied.

6. Motion to Strike Affidavit of Mark Gould, affidavit of Lora Ruscitti, and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele filed by plaintiff June 27, 1989, is denied.

7. All other post-judgment motions not specifically dealt with in this order are denied, and the court confirms that the judgment entered herein and signed by the court on September 30, 1987, is a final judgment.

1. Dated July 31, 1989.

BY THE COURT:

_____

District Judge

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO
Civil Action Number 88 CV24787, Courtroom 21

DEPOSITION OF GILBERT M. SACKHEIM
JANUARY 29, 1990

EMILIANO RUSCITTI AND LINDA GOULD,
formerly known as LINDA RUSCITTI

Plaintiffs,

v.

LORA RUSCITTI, by her mother and next friend MARIA RUSCITTI; FARMERS INSURANCE GROUP OF COMPANIES; FARMERS INSURANCE EXCHANGE; FIRE INSURANCE EXCHANGE; CARL NUCKOLS; GILBERT M. SACKHEIM; DAY AND SACKHEIM; ROBERT GERALD HANNON; and WILLIAM CONTI, also known as BILL CONTI,

Defendants.

APPEARANCES

FOR THE PLAINTIFFS:	JACK KINTZELE, ESQ. Attorney at Law 1317 Delaware Street Denver, Colorado 80204
FOR THE DEFENDANT FARMERS INSURANCE:	EUGENE O. DANIELS, ESQ. Hall & Evans 1200 Seventeenth Street Suite 1700 Denver, CO 80202

ALSO PRESENT: BRYAN WAKEFIELD
MARV SETZKE
GEORGE POULTER
LINDA GOULD
GIODANNI RUSCITTI
EMILIANO RUSCITTI
HELEN ZADEL

A. When?

Q. Anytime prior to September 25, 1987.

A. I don't recall.

Q. Would you be in a position to refute Linda Ruscitti's -- now Linda Gould -- statement that you had absolutely no contact with her prior to September 25, 1987?

A. I don't know?

Q. Did you look at your file in preparation of this deposition?

A. Which file?

Q. Any file relating to the Goulds or the Ruscittis.

A. No.

Q. All right. And if Mr. Ruscitti --

Emiliano Ruscitti said that you absolutely had no contact with him prior to September 25, 1987, could you refute that?

A. I don't know.

Q. As to any contact with either one of them prior to September the 25th, 1987, you don't recall that at all, do you?

A. That's correct, I don't recall that.

Q. And it's your statement that as of today you have no

evidence of contacting them prior Page 8

to September 25, 1987?

A. I haven't made that statement.

Q. Well, do you have any evidence of having contacted them prior to September the 25th, 1987?

A. I don't know.

Q. Where would that evidence be if you do have it?

A. That's hypothetical. I can't answer that.

Q. Would it be in your file?

A. I don't know.

Q. Would it be in any other records that you have?

A. I don't know.

Q. You don't have any memory of having contacted them prior to September 25, 1987, do you?

A. I don't know if I did or I didn't. I don't remember.

Q. Well, today do you have any memory of having contacted them prior to September 25, 1987?

A. I don't remember.

Q. You don't remember if you have any evidence?

A. I think you're going over the same

questions. I'm only going to answer the same question one or two times, and then you need to go on. Rephrase the question.

Q. Do you have any evidence here today that you can testify to or any documents that you brought that indicates that you contacted them prior to September 25, 1987?

A. No.

Q. Do you know of any sources of evidence, whether it be documentary or verbal, that you can check to see if you contacted them prior to September 25, 1987?

A. I don't know what sources of evidence there are.

Q. Have you maintained files on Ms. Gould and Mr. Ruscitti?

A. I have some material and some files concerning some litigation with either or both of them.

Q. And where are those files kept?

A. In my office.

Q. Are they kept anywhere else?

A. No.

(Whereupon, Deposition Exhibit

Number 2 was marked for identification)

Q. (By Mr. Kintzele) Let me hand you what's been marked as Deposition Exhibit 2, and I'll ask you if you can identify what that's a copy of.

A. It appears to be a copy of a subpoena to produce.

Q. May I have Exhibit 2 back. Was that served on you?

A. A copy of it was, yes.

Q. On what date?

A. I'm not certain what date, sometime last week.

Q. It would have been prior to Thursday of last week?

A. I think so.

Q. And you called my office a number of times after that concerning this deposition?

A. Yes.

Q. And at any time during that

discussion with me concerning this deposition, did you mention that you were going to file a Verified Motion for Protective Order?

A. No.

(Whereupon, Deposition Exhibit Number 3 was marked for identification)

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Q. (By Mr. Kintzele) Let me hand you what's been marked as Exhibit 3. What is that, please.

A. It's a copy of a Verified Motion for Protective Order.

Q. And that's what you produced for the first time this morning to us?

A. Yes.

Q. And did you attempt to give any other notice of this Verified Motion for Protective Order prior to this morning?

A. Give notice to whom?

Q. Anyone

A. Well, I think conversations I may

have -- may have had with my office staff or client would be privileged. If the question is did I attempt to give any advance notice to you or to Mr. Daniels, the answer is no.

Q. Did you bring any records this morning?

A. No.

Q. Have you filed this Verified Motion for Protective Order with the Court?

A. I don't believe it's been filed as of this moment.

APPENDIX D

DISTRICT COURT

COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 88CV 1956

DEPOSITION OF GILBERT M. SACKHEIM
March 20, 1990

MARIA RUSCITTI,

Plaintiff,

v

CAROL NUCKOLS; GILBERT M. SACKHEIM; and

DAY AND SACKHEIM,

Defendants.

APPEARANCES

FOR THE PLAINTIFF: JACK KINTZELE, ESQ.
1317 Delaware Street
Denver, Colorado 80204

FOR THE DEFENDANTS: GILBERT M. SACKHEIM, ESQ.
Day & Sackheim
1910 7th Street
Boulder, Colorado 80302

believe that any one of those three claims involves or relates to any of the things that are talked about in the transcript of my deposition of January 29, 1990.

MR. KINTZELE: Are you familiar with the case called Lucas v. the District Court of Colorado case?

MR. SACKHEIM: Not offhand.

MR. KINTZELE: All right. Are you saying that you refuse to answer the inquiry concerning the first 13 pages?

MR. SACKHEIM: I refuse to answer on the grounds that I just stated; namely, that it's irrelevant, that it's not reasonably calculated to lead to the discovery of admissible evidence under Rule 26. And once again, I'll file a motion for protective order.

MR. KINTZELE: I'll want you to pursue all inquiry, Mr. Sackheim.

Q. (By Mr. Kintzele) In connection with outrageous conduct, would you agree that it would be outrageous conduct to make erroneous statements to a trial judge in applying for default judgments?

MR. SACKHEIM: I have no opinion about that. It also seems to me it calls for a legal conclusion. It also appears to me to be irrelevant on all of those grounds. I'm not going to answer those

MR. SACKHEIM: Ask me your next question. We're getting bogged down on this, and I'm going to object on the grounds of relevancy.

Q. (By Mr. Kintzele) Well, you asked how I defined "record," and I'd appreciate your definition of "record".

A. I don't care what you appreciate.

Q. Are you refusing to give me an answer?

A. Ask me your next question, Mr.

Kintzele, or the deposition is over.

Q. What is your definition of "record"?

MR. SACKHEIM: I'm placing you on notice that if you fail to ask me another question, I'm going to assume that the deposition is over, and I'm going to get up and leave.

Q. (By Mr. Kintzele) Mr. Sackheim, I'm entitled to know what your definition of "record" is. Would you please tell me what you mean by the work "record"?

(The deponent left the deposition room).

Thank you, Mr. Sackheim, I have many other questions to ask you.

(Whereupon, it was further stipulated and agreed by counsel for the respective parties and the deponent herein that the signature of GILBERT M.

APPENDIX E

COLORADO COURT OF APPEALS

No. 89 CA 1433

CARL NUCKOLS,

Plaintiff-Appellee,

v.

LINDA E. RUSCITTI and EMILIANO RUSCITTI,

Defendants-Appellants.

NOT SELECTED FOR PUBLICATION

Appeal from the District Court of Weld County
No. 87CF493

Honorable Robert A. Behrman, Judge

DIVISION II

JUDGMENT AFFIRMED

Opinion by JUDGE METZGER
Smith and Plank, JJ., concur

Day & Sackheim
Gilbert M. Sackheim
Boulder, Colorado

Attorneys for Plaintiff-Appellee

Jack Kintzele
Denver, Colorado

Attorney for Defendant-Appellants

The dispositive issue in this case is whether the trial court erred in denying the motion of defendants, Linda E. and Emiliano Ruscitti, to set aside the default judgment entered against them and in favor of plaintiff, Carl Nuckols. We affirm.

Defendants' motion was the subject of a full evidentiary hearing. In its extensive findings and conclusions, the trial court determined hotly disputed factual issues adversely to defendants. We have reviewed the record and conclude that the trials court's determinations are amply supported. Accordingly, we will not disturb them. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979); Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Defendants' remaining contentions of error are without merit.

Judgment affirmed.

JUDGE SMITH and JUDGE PLANK concur.

APPENDIX F

SUPREME COURT, STATE OF COLORADO
Case No. 90SC402
Certiorari to the Colorado Court of Appeals
90CA1433
Weld County District Court 87CV493

ORDER OF COURT

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioners,

v.

CARL NUCKOLS,

Respondent.

Upon consideration of the Petition for Write of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 10, 1990.

cc: James G. Benway, Clerk
Colorado Court of Appeals

Jack Kintzele
1317 Delaware Street
Denver, CO 80204

Day & Sackheim
Gilbert M. Sackheim
1910 Seventh Street
Boulder, CO 80302

Honorable Robert A. Behrman
Weld County District Court
Weld County Courthouse
915 10th Street
P.O. Box C
Greeley, CO 80632

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

No. 90-1547

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioners,

vs.

CARL NUCKOLS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COLORADO COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION

GILBERT M. SACKHEIM
DAY & SACKHEIM
1910 Seventh Street
Boulder, CO 80302
Telephone (303) 447-9688
FAX (303) 786-8536
Counsel for Respondent

BEST AVAILABLE COPY

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QUESTION PRESENTED FOR REVIEW

Is a substantial federal question presented under circumstances where a trial court denies a party's request for a second hearing on a motion to set aside default judgment, where a full evidentiary hearing had already been held on the party's motion to set aside default judgment, and where the trial court found that the affidavits in support of the second motion to set aside confirmed that the party's main witness was not credible?

LACK OF JURISDICTION

Pursuant to 28 U.S.C. § 1257 and Rule 10 of the Rules of the Supreme Court of the United States, there is no substantial federal question presented, and the decision by the state court rests upon adequate non-federal grounds. Therefore, this Court should deny

the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

1. The Respondent filed a lawsuit against the Petitioners stemming from a motor vehicle accident in which the Respondent sustained serious injuries. An Affidavit of Service (Appendix A, p. A-1) was filed with the trial court, stating that the Petitioners had been personally served with copies of the Summons and Complaint.

2. The Petitioners failed to respond in any manner to the Summons and Complaint, so the trial court entered a default. (Appendix B, p. A-3). The trial court also entered a default judgment (Appendix C, p. A-5) against them, for $35,156, plus interest.

3. The Petitioners filed a Motion to Set Aside Default Judgment (Appendix D, p. A-7), alleging they had not been served with

copies of the Summons and Complaint.

4. A full evidentiary hearing was held on the Motion to Set Aside Default Judgment. The testimony was in conflict. The Petitioner Linda Ruscitti testified that she had not been served with the Summons and Complaint, but the process server, Robert Hannon, testified that Linda Ruscitti was in fact the person on whom he had served the documents, and he made an in-court identification of her as being the person to whom he had handed the Summons and Complaint. (Appendix E, pps. A-17 to A-20)

5. Based on the conflicting testimony, the trial court found the story presented by the Petitioners and their witnesses "not to be convincing," "impossible," "incomprehensible," and "incredible," and denied the motion to set aside default judgment. (Appendix F, pps. A-23 to A-24)

6. The Petitioners filed a Second Motion to Set Aside Default Judgment, claiming

new evidence, in the form of an Affidavit from Lora Ruscitti, the younger sister of Linda Ruscitti. Lora Ruscitti had testified at the evidentiary hearing. The trial court found that the Affidavit from Lora Ruscitti strengthened, not reduced, the court's doubts as to her credibility, and it denied the Second Motion to Set Aside Default Judgment without hearing. (Appendix G, pps. A-27 to A-29)

7. In the Second Motion to Set Aside Default Judgment, the Petitioners also argued that the Respondent's attorney had made a false statement to the trial court at the time it had entered the default judgment. The Respondent's attorney denies ever having made a false or misleading statement to the trial court. (Appendix H, p. A-36) Furthermore, the reason why the trial court entered a default judgment against the Petitioners was their failure to respond to the Summons and

Complaint. Statements made to the trial court by counsel had nothing to do with the entry of the default and the default judgment, and are totally irrelevant.

8. The Petitioners appealed the denial of their Motion to Set Aside Default Judgment to the Colorado Court of Appeals. The Colorado Court of Appeals affirmed that denial, ruling as follows: "Defendants' motion was the subject of a full evidentiary hearing. In its extensive findings and conclusions, the trial court determined hotly disputed factual issues adversely to defendants. We have reviewed the record and conclude that the trial court's determinations are amply supported." (Appendix I, p. A-39)

9. In their appeal, the Petitioner's made several other arguments, including the argument that the trial court had been "lied to" by Respondent's attorney. The Colorado Court of Appeals found all of these additional

arguments to be "without merit." (Appendix I, p. A-40)

10. The Petitioner's Petition for Writ of Certiorari to the Colorado Supreme Court was denied by that Court. (Appendix J, p. A-41)

ARGUMENT

The Petitioners received a full evidentiary hearing on their Motion to Set Aside Default Judgment. They had no constitutional or other federally protected right to have a second hearing, especially where the trial court found that the Affidavits submitted in support of their request for a second hearing showed more strongly than ever that they and their witnesses were not credible.

The allegations against the Respondent's

attorney are absolutely false. In addition, they are totally irrelevant because there is no connection whatsoever between statements made by the Respondent's attorney and the entering of the default judgment.

The Petition for Writ of Certiorari fails to present a substantial federal question. 28 U.S.C. § 1257; Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

The Petition for Writ of Certiorari should be denied because it fails to present a substantial federal question, and the decision by the state court rests upon adequate non-federal grounds.

Respectfully submitted,

GILBERT M. SACKHEIM
DAY & SACKHEIM
1910 Seventh Street
Boulder, CO 80302
Telephone (303) 447-9688
FAX (303) 786-8536
Counsel for Respondent

APPENDIX A

DISTRICT COURT, WELD COUNTY, COLORADO

CARL NUCKOLS vs. LINDA E. RUSCITTI and EMILIANO RUSCITTI

AFFIDAVIT OF SERVICE

Robert Hannon, the affiant, being sworn, says: That he is over the age of 18 years with no interest in this action and has served summons and complaint upon:

1.) LINDA E. RUSCITTI by delivering copies to her at 534 2nd Street, Frederick (Weld County), colorado on 5/6/87 at 8:55 p.m.;

2.) EMILIANO RUSCITTI by leaving copies thereof at his usual place of abode with some member of his family (daughter Linda Ruscitti) over the age of 18 years, at 534 2nd Street, Frederick (Weld County), Colorado on 5/6/87 at 8:55 p.m.

/s/ Robert Hannon

Subscribed and sworn to before me this 7th day of May, 1987. My commission expires: 9/30/89

/s/ Jane Conti

Notary Public

APPENDIX B

DISTRICT COURT, WELD COUNTY, COLORADO

Case No. 87 CV 493

ORDER

CARL NUCKOLS,

Plaintiff,

vs.

LINDA E. RUSCITTI and EMILIANO RUSCITTI,

Defendants.

The court, having examined the file of the above case and the documents contained therein, finds them in order. The court further finds that the above named Defendants Linda E. Ruscitti and Emiliano Ruscitti were personally served with copies of the Summons and Complaint herein on May 6, 1987 and that at this time more than 20 days have expired and

that the Defendants have failed to plead or otherwise defend as provided by Rule 12, C.R.C.P. Therefore, it is ordered that the default of the Defendants is hereby entered.

Dated August 19, 1987.

BY THE COURT:

/s/ Robert A. Behrman

District Judge

APPENDIX C

DISTRICT COURT, WELD COUNTY, STATE OF COLORADO

Civil Action No. 87CV-0493, Div. 1

JUDGMENT

CARL NUCKOLS,

Plaintiff,

v.

LINDA E. RUSCITTI and

EMILIANO RUSCITTI,

Defendants.

THIS MATTER came on for hearing on September 25, 1987 on the Plaintiff's Motion for Entry of Default Judgment. The Plaintiff was present and represented by Gilbert M. Sackheim. Testimony was taken from the Plaintiff. Based on the

testimony,

THE COURT ORDERS that judgment shall be, and it hereby is, entered in favor of the Plaintiff, Carl Nuckols, and against the Defendants, Linda E. Ruscitti and Emiliano Ruscitti, jointly and severally, in the amount of $35,000, plus costs of $156, for a total judgment in the amount of $35,156, plus interest at the lawful rate from May 4, 1985.

SIGNED this 30th day of September, 1987.

BY THE COURT:

/s/ Robert A. Behrman

_____

District Court Judge

APPENDIX D

DISTRICT COURT, WELD COUNTY, STATE OF COLORADO

Civil Action No. 87 CV 0493, Division 1

MOTION TO SET ASIDE DEFAULT JUDGMENT, TO DISMISS THIS CIVIL ACTION WITH PREJUDICE, AND FOR ATTORNEY'S FEES AND COURT COSTS HEREIN INCURRED.

CARL NUCKOLS,

Plaintiff,

v.

LINDA E. RUSCITTI and

EMILIANO RUSCITTI,

Defendants.

COMES NOW the Defendants, by and through their law firm, Jimmie Joe Honaker, P.C., and as grounds for this

MOTION states as follows:

FIRST GROUND FOR RELIEF

(1.) That on May 4, 1985, a traffic collision occurred between the Plaintiff and Co-Defendant Linda E. Ruscitti. This civil action based on negligence was initiated as the result of said collision and the personal injuries and property damage sustained thereat by the Plaintiff.

(2.) That this cause of action accrued on May 4, 1985. C.R.S. 13-80-108. "When a cause of action accrues." (formerly §13-80-109)

(3.) That there is a statute of limitations of two years applicable to this civil action. C.R.S. 13-80-102. "General limitation of actions - two years." (formerly §13-80-110)

(4.) That alleged service upon the Defendants, according to the records of

this Court, was made on May 6, 1987 - more than two years after the collision.

(5.) That this civil action was filed with this Court as of May 14, 1987 - more than two years after the collision.

(6.) That this civil action may only be commenced by the filing of a complaint or by the service of a summons. Rule 3. C.R.C.P.

(7.) That the expiration of the statute of limitations raises a jurisdictional issue which this Court may review at any time.

SECOND CLAIM FOR RELIEF

(8.) That alleged service upon the Defendants, according to the records of this Court, was made upon Linda E. Ruscitti.

(9.) That said Linda E. Ruscitti absolutely denies that she received any

papers, pleadings, documents, or service whatsoever concerning this civil action, and to that extent her AFFIDAVIT is hereto attached.

(10.) That service in this civil action was improper and/or inadequate. Rule 4. C.R.C.P.

(11.) That improper or inadequate service raises a jurisdictional issue which this Court may review at any time.

THIRD GROUND FOR RELIEF

(12.) That Plaintiff and/or his attorneys should have realized that the statute of limitations precluded the filing of this civil action, and to have proceeded anyway is to say the least, negligent.

(13.) That Defendants have been forced to retain a law firm and incur costs to set aside this civil action and

resulting DEFAULT JUDGMENT.

WHEREFORE, the Defendants request that the DEFAULT JUDGMENT heretofore entered on September 30, 1987, be set aside; that this civil action be dismissed with prejudice; and that the Defendants be given a judgment against the Plaintiff and his attorneys, jointly and severally, for Defendants' attorney's fees and court costs herein incurred.

DATED: June 14, 1988

JIMMIE JOE HONAKER, P.C.
Attorneys for Defendants
/s/ Jimmie Joe Honaker

Jimmie Joe Honaker #003120
647 Seventeenth Avenue
Longmont, CO 80501-2601
(303) 772-2000

CERTIFICATE OF MAILING

I hereby certify that I have this day mailed a copy of the above MOTION TO SET ASIDE DEFAULT JUDGMENT, TO DISMISS THIS CIVIL ACTION WITH PREJUDICE, AND FOR ATTORNEY'S FEES AND COURT COSTS HEREIN INCURRED, postage prepaid, to: Gilbert M. Sackheim; Attorney for Plaintiff; 1910 Seventh Street; Boulder, CO 80302.

APPENDIX E

DISTRICT COURT, DIVISION 1, COUNTY OF WELD, STATE OF COLORADO

Case No. 87CV493

REPORTER'S TRANSCRIPT

TRIAL DATE: SEPTEMBER 8, 1988

FRIDAY P.M.

CARL NUCKOLS, PLAINTIFF,

Vs.

LINDA E. RUSCITTI and

EMILIANO RUSCITTI, DEFENDANTS.

The trial in the above-captioned matter commenced for trial on the 8th day of September, 1988, before the HONORABLE ROBERT A. BEHRMAN, Judge of Division 1, County of Weld, State of Colorado. This transcript contains proceedings of

September 8, 1988.

APPEARANCES:

For the Applicant: Gilbert M. Sackheim, Esq.

For the Defendants: Jimmy Joe Honaker, Esq.

ELIZABETH A. MELDAHL CSR

(303) 456-4000 EXT. 4556

TRIAL DATE SEPTEMBER 8, 1988

WITNESSES:

For the Defendant:

ROBERT HANNON,

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Cross-examination by Mr. Sackheim 14

LINDA GOULD

Direct examination by Mr. Honaker 19

Cross-examination by Mr. Sackheim 25

Redirect Examination by Mr. Honaker 36

LAURA ANN RUSCITTI

Direct Examination by Mr. Honaker 37

Cross-examination by Mr. Sackheim 41

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EMILIANO RUSCITTI

Direct Examination by Mr. Honaker 46

Cross-examination by Mr. Sackheim 52

BRIAN WAKEFIELD

Direct Examination by Mr. Honaker 54

REBUTTAL FOR PLAINTIFF:

ROBERT HANNON

Direct Examination by Mr. Sackheim 61

down.

MR. HONAKER: No further witnesses.

THE COURT: Mr. Sackheim?

MR. SACKHEIM: If I might have a minute, Your Honor. I think I might have rebuttal.

MR. SACKHEIM: The Plaintiff calls in his case Robert Hannon.

ROBERT HANNON,

having been previously sworn, was called as a rebuttal witness by the Plaintiff, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SACKHEIM:

Q Mr. Hannon, can you identify the, can you tell whether the person to whom you handed the papers is in the courtroom today?

A Yes, sir, she is.

Q And can you identify her now please?

A Yes, sir she is the girl back there in the purple dress is the girl I gave the papers to coming up on the sidewalk.

Q And the woman in the purple dress is the woman who already testified and that in fact is Linda Gould, formerly Linda Ruscitti?

A As far as I know. That is the person I handed the

papers to.

Q Can you tell whether you see in the courtroom today, the young woman who answered the door?

A No, sir, I can't tell you positively.

Q But are you positive that Linda Ruscitti now Linda Gould is the person you handed the papers to?

A Yes, upon seeing her, yes, sir, I am.

Q You have heard the testimony I take it from Laura Ruscitti that you ended up or that at least someone ended up handing her some papers after she told this man that Linda wasn't home; you heard that testimony?

A Yes, sir, I did.

Q Are you positive that you handed

the papers to Linda Ruscitti and not to Laura Ruscitti?

A I know for a fact I did not hand the papers to the person at the door. I handed them to the lady coming up who got out of the car and came toward the door on the sidewalk.

Q And that woman is Linda Ruscitti?

A Yes, sir.

MR. SACKHEIM: No further questions.

THE COURT: Mr. Honaker?

MR. HONAKER: No questions, Your Honor.

THE COURT: Thank you very much, sir. You may step down.

MR. SACKHEIM: We have no other witness.

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as official reporter of Water Division 1, State of Colorado.

Dated at Greeley, Colorado, this 20th day of December, 1988.

/s/ Elizabeth A. Meldahl

_____

Elizabeth A. Meldahl, C.S.R.

APPENDIX F

MR. HONAKER: I believe that happened, because Mr. Ruscitti did not have any knowledge of the situation until after the insurance company people contacted him.

THE COURT: Yes, that is right, but that was several months ago.

Q. That was in April.

THE COURT: Yes, but Laura testified she didn't remember about all this until last week

MR. HONAKER: Well, I understand Laura's testimony to mean that she did not have a complete blank until last year--until last week, but that until she, that she had not been able to admit or accept the fact that she had been served the papers until she was confronted by her

father under the circumstances.

THE COURT: Okay.

MR. HONAKER: I believe that is not to be unexpected from a minor and that that is specifically why the law read the way it does, that you cannot serve a minor. My time is up.

THE COURT: All right. Well I'm not going to call on you, Mr. Sackheim, because I find the plaintiff's story not to be, defendants' story not to be convincing, it appears to me impossible.

The most convincing witness, the crucial witness seems to be Laura and either there is a, she has an extremely poor memory, which is the reason I gave the comment that I thought the testimony of her father went to her credibility, which it seems to me it did, because here the father testified she told him back in

March that she didn't -- that she had gotten the papers, and yet she just testified that she didn't remember she got the papers until last week. To my mind that is incomprehensible, that is incredible.

The motion to set aside the judgment is denied.

MR. SACKHEIM: I renew my motion for award of attorney fees. As I have explained before, I spent a few hours on this issue of the statute of limitations, all for nothing as it turns out.

THE COURT: No, I'm not going if grant you attorney fees. Things are probably bad enough, since they don't have insurance coverage. So that will be the order of the Court.

We are in recess.

(Proceedings adjourned at 5:00 P.M.)

APPENDIX G

DISTRICT COURT, WELD COUNTY, COLORADO

Case No. 87 CV 493 Division I

ORDER

CARL NUCKOLS,

Plaintiff,

vs.

LINDA E. RUSCITTI, now known as LINDA E. GOULD and EMILIANO RUSCITTI,

Defendants.

This case is pending on six motions, to-wit:

(1) Second Motion to Set Aside Default Judgment filed by defendants on April 14, 1989.

(2) Motion to Dismiss Defendants' Second Motion to Set Aside Default

Judgment; Motion for Attorney's Fees filed by plaintiff April 17, 1989.

(3) Motion for Protective Order; Motion for Attorney's Fees filed by plaintiff April 19, 1989.

(4) Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989.

(5) Motion for Cost Bond filed by defendants May 18, 1989.

(6) Motion to Strike Affidavit of Mark Gould, Affidavit of Lora Ruscitti, and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele filed by plaintiff June 27, 1989.

This case was appealed from this court to the Colorado Court of Appeals. On April 6, 1989, the appeal was dismissed for failure of the defendants-appellants

to respond to an order to show cause issued by the Court of Appeals. On May 17, 1989, the Court of Appeals issued its mandate to this court which states as follows:

> This cause came on to be heard on the record on appeal from the District Court of the County of Weld, State of Colorado, and in consideration whereof, it is ORDERED that the appeal is DISMISSED.

The record on appeal was returned to this court on July 11, 1989, enabling this court to consider certain aspects of the defendants' motions which required reference to the record.

The Second Motion to Set Aside Default Judgment filed by defendants is based primarily on matters relating to the service of process in this action.

Defendants contend that the service was made on a fifteen year old child, Lora Ruscitti, rather than on defendant Linda Ruscitti, now Linda Gould. The court conducted a full evidentiary hearing on the point and determined the factual issues contrary to the contentions of the defendants.

The defendants have filed a series of affidavits which do not convince the court that further hearing is justified. Lora Ruscitti now says that she testified falsely at the original evidentiary hearing. Doubts concerning the credibility of Lora Ruscitti as a witness substantially contributed to the court's findings at the evidentiary hearing. The affidavit strengthens, rather than reduces, those doubts. Linda Gould's husband now says that he remembers that

she was with him in Longmont on the evening of service. Linda Gould testified that she could not remember where she was that evening and no explanation is made why the husband was not produced at the evidentiary hearing.

The motion also indicates that the summons was defective; however, the court's examination does not reveal any defect. The rest of the allegations of the motion do not appear to have merit.

Since the factual matters were the subject of a full hearing and were decided adversely to defendants and since the other matters raised do not appear to have substantial merit, the Second Motion to Set Aside Default Judgment should be denied.

The foregoing action substantially grants the Motion to Dismiss Defendants'

Second Motion to Set Aside Default Judgment; Motion for Attorney's fees. The court will not, however, order attorney fees in this connection.

The action of the court regarding the Second Motion to Set Aside Default Judgment requires the granting of Motion for Protective Order; Motion for Attorney's Fees. There appear to be no factual matters pending in this action and there can be no purpose to plaintiff's deposition. Here again the court will not impose attorney fees.

The Motion for Cost Bond filed by the defendants is moot. It is not established that plaintiff is, in fact, a nonresident, and final judgment has been entered herein. Under these circumstances a cost bond is not at present required.

The Motion to Strike Affidavit of

Mark Gould, Affidavit of Lora Ruscitti, and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele should be denied. The court has considered those affidavits, but did not find them to be convincing.

The court is unclear what action the defendants intend to take regarding their appeal. It may be that they have abandoned it, or it may be that they will attempt to reinstate their appeal. The court will take no present action on the Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989, and will order that a hearing be set on that motion. Setting should be made with the clerk of this division, Mrs. Shirley Stow, (303) 356-4000, extension 4554. Settings are made on Tuesdays, Wednesdays, and

Thursdays between 8:30 A.M. and 9:00 A.M.

The Court of Appeals apparently entertained some question as to whether the judgment entered herein and signed by the court on September 30, 1987, is a final judgment. The court does not fully understand the reasons for such doubts; however, to avoid any possible misunderstanding, the court will enter a blanket order denying all other post-judgment motions herein except the Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff upon which a hearing must be held. It is the court's understanding that the pendency of that motion will not affect the finality of the judgment herein.

Although the court has serious doubts as to the underlying validity of a number of the motions which have been filed, it

has not awarded attorney fees because of the somewhat confusing circumstances surrounding the appeal of this case. Since this order should clarify the situation, a somewhat different standard may be applied to future motions for attorney fees.

ORDER

For the reasons set forth above, it is

ORDERED by the court as follows:

1. Second Motion to Set Aside Default Judgment filed by defendants on April 14, 1989, is denied.

2. Motion to Dismiss Defendants' Second Motion to Set Aside Default judgment; Motion for Attorney's Fees filed by plaintiff April 17, 1989, is granted to the extent that defendants' motion is denied, and is denied as to attorney fees.

3. Motion for Protective Order; Motion for Attorney's Fees filed by plaintiff April 19, 1989, is granted, except for the request for attorney fees which is denied.

4. Motion to Dismiss Stay of Execution, and Motion to Release Appeal Bond to Plaintiff filed by plaintiff April 19, 1989, shall be set for hearing before the court in accordance with the instructions set forth above.

5. Motion for Cost Bond filed by defendants May 18, 1989, is denied.

6. Motion to Strike Affidavit of Mark Gould, Affidavit of Lora Ruscitti and Joint Affidavit of Emiliano Ruscitti, Linda Gould and Jack Kintzele filed by plaintiff June 27, 1989, is denied.

7. All other post-judgment motions not specifically dealt with in this order

are denied, and the court confirms that the judgment entered herein and signed by the court on September 30, 1987, is a final judgment.

Dated July 31, 1989.

BY THE COURT:

/S/ Robert A. Behrman

_____

District Judge

APPENDIX H

AFFIDAVIT OF GILBERT M. SACKHEIM

Gilbert M. Sackheim, under oath, states as follows:

1. At no time did I ever make a false or misleading statement to the District Court, County of Weld, State of Colorado, in Case No. 87-CV-493, the caption of which is Carl Nuckols, Plaintiff vs. Linda E. Ruscitti and Emiliano Ruscitti, Defendants.

2. The allegation to the contrary by the Petitioners' attorney is libelous. I intend to file suit against him as soon as this case is finally resolved.

Dated: April 10, 1991

/s/ Gilbert M. Sackheim

Gilbert M. Sackheim

STATE OF COLORADO

ss:

COUNTY OF BOULDER

SUBSCRIBED AND SWORN to before me, a Notary Public in and for the State of Colorado, by Gilbert M. Sackheim on April 10, 1991.

Notary Public

1910 Seventh Street

Boulder, CO 80302

My commission expires: 6/14/91

APPENDIX I

COLORADO COURT OF APPEALS

No. 89CA1433

CARL NUCKOLS,)

Plaintiff-Appellee,)

v.)

LINDA E. RUSCITTI and)

EMILIANO RUSCITTI,)

Defendants-Appellants.)

DIVISION II JUDGMENT AFFIRMED

Opinion by JUDGE METZGER

Smith and Plank, JJ., concur

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Boulder, Colorado

Attorneys for Plaintiff-Appellee

Jack Kintzele

Denver, Colorado

Attorney for Defendants-Appellants

The dispositive issue in this case is whether the trial court erred in denying the motion of defendants, Linda E. and Emiliano Ruscitti, to set aside the default judgment entered against them and in favor of plaintiff, Carl Nuckols. We affirm.

Defendants' motion was the subject of a full evidentiary hearing. In its extensive findings and conclusions, the trial court determined hotly disputed factual issues adversely to defendants. We have reviewed the record and conclude that the trial court's determinations are amply supported. Accordingly, we will not disturb them. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979); Buckmiller v.

Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Defendants' remaining contentions of error are without merit.

Judgment affirmed.

JUDGE SMITH and JUDGE PLANK concur.

APPENDIX J

SUPREME COURT, STATE OF COLORADO

Case No. 90SC402

Certiorari to the Colorado Court of Appeals 89CA1433

Weld County District Court 87CV493

ORDER OF COURT

EMILIANO RUSCITTI and LINDA RUSCITTI GOULD,

Petitioners,

v.

CARL NUCKOLS,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of

said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 10, 1990.

cc: James G. Benway, Clerk
Colorado Court of Appeals

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Honorable Robert A. Behrman

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